(2)

No. 10-034

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2010

CHARLES L. RYAN, Director,
Arizona Department of Corrections,

Petitioner,

v.

FRED LAWRENCE ROBINSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

PATRICK E. McGILLICUDDY
331 N 1st Ave., Suite 210
Phoenix, AZ 85003-4528
(602) 452-2915
*Counsel of Record

COUNSEL FOR RESPONDENT

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. When raising a claim in a state's highest court, does a capital defendant fairly present, for purposes of the federal habeas exhaustion requirement, federal constitutional challenges to the sufficiency of the evidence to support a statutory aggravating factor by (1) asserting how the evidence is insufficient, (2) framing the violation in terms of the stature's language, and (3) citing in conjunction with that challenge a federal appellate decision that resolved such a challenge on constitutional grounds?

2. In a capital sentencing hearing, does the defendant's lawyer render constitutionally ineffective assistance of counsel, when he admittedly presented no mitigating evidence because he conducted no investigation whatsoever?

TABLE OF CONTENTS

Questions Presented for Review ii

Table of Contents iii

Table of Authorities iv

Statement of the Case 1

Reasons for Denying the Petition 7

I. ROBINSON'S CLAIM THAT THE "ESPECIALLY CRUEL, HEINOUS AND DEPRAVED" AGGRAVATING CIRCUMSTANCE WAS INVALIDLY FOUND AGAINST HIM WAS FAIRLY PRESENTED TO THE ARIZONA SUPREME COURT. FURTHERMORE, THE COURT OF APPEALS WAS CORRECT THAT THE ARIZONA COURT ARBITRARILY FOUND THIS AGGRAVATING CIRCUMSTANCE APPLIED TO ROBINSON, BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE FINDING. 7

II. ROBINSON FAIRLY PRESENTED HIS CLAIM TO THE STATE COURT THAT THE "ESPECIALLY CRUEL, HEINOUS OR DEPRAVED" AGGRAVATING CIRCUMSTANCE WAS ARBITRARILY FOUND BY THE SENTENCING COURT 9

III. THE COURT OF APPEALS CORRECTLY FOUND THAT THE SENTENCING COURT ARBITRARILY FOUND THAT THE "ESPECIALLY CRUEL, HEINOUS OR DEPRAVED" AGGRAVATING CIRCUMSTANCE WAS ARBITRARILY FOUND BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE FINDING. 12

IV. ROBINSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS SENTENCING COUNSEL CONDUCTED NO INVESTIGATION INTO READILY AVAILABLE MITIGATION, AND PRESENTED NO MITIGATING EVIDENCE TO THE SENTENCING COURT, AND ROBINSON WAS PREJUDICED BY HIS FAILURE TO DO SO. 18

Conclusion 27

TABLE OF CITED AUTHORITIES

SUPREME COURT CASES:

Baldwin v. Reese, 541 U.S. 27 (2004) 9, 20

Bobby v. Van Hook, 558 U.S. ___ 130, S.Ct. 13 (2009) 25, 26

Clemons v. Mississippi, 494 U.S. 738 (1990) 21

Harris v. Alabama, 513 U.S. 504 (1995) 20, 21

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 31 n.5 (1993) (*per curiam*) 17

Lewis v. Jeffers, 497 U.S. 764 (1990) 7, 8, 10,11, 12, 13

Lindh v. Murphy, 521 U.S. 320, 336-337 (1997) 1

Picard v. Conor, 404 U.S. 270 (1971) 9, 10

Porter v. McCollum, 505 U.S. ___, 130 S. Ct. 447 (2009) 20, 26, 27

Rompilla v Beard, 545 U.S. 374 (2005) 20

Ross v. Moffit, 417 U.S. 600, 616-617 (1974) 11

Smith v. Texas, 543, U.S. 37, 45 (2004) 5, 21

Strickland v Washington, 466 U.S. 668 (1984) 20, 21, 27

Tennard v. Dretke, 542 U.S. 274 (2004 21

(Terry)Williams v. Taylor, 529 U.S. 362 (2000) 19, 20, 22, 23, 27

Wiggins v Smith, 539 U.S. 570 (2003) 19, 20, 27

Wong v. Belmontes, 558 U.S. ___, 130 S. Ct. 383 (2009) 23, 24

Wood v. Allen, 130 S. Ct. 841, 851 (2010) 17

FEDERAL CASES:

Jeffers v. Ricketts, 832 F. 2d 476 (9th Cir. 1987) 7, 8, 10, 11

Robinson v. Schriro, 595 F.3d. 1086 (2010) 13-9,13, 15, 16, 18-22

STATE CASES:

State v. Carlson, 201 Arizona 570, 48 P.3d 1180 (2002) 11, 13, 14, 17

State v. Detrich, 188 Ariz. 57, 932 P.2d 1328 (1997) 14

State v. Murdaugh, 209 Ariz. 19, 97 P.3d 844, 856 (2004) 14

State v. Newell, 212 Ariz. 389, 132 P.3d 833 (2006) 14

State v Robinson, 165 Ariz. 51, 796 P.2d 853 (1990) 3

State v. Robinson, 796 P.2d at 858 ..... 11, 15

State v. Ross, 180 Ariz. 598, 886 P.2d 1354 (1994) 15

SUPREME COURT RULES:

Rule 10. 7

ARIZONA STATUTES:

§ 13-703(F)(6) 16

UNITED STATES CONSTITUTION:

Eighth Amendment 5, 7, 9, 14

Fourteenth Amendment 5, 9

STATEMENT OF THE CASE

In this pre AEDPA capital appeal, the court of appeals reversed and remanded the district court's finding that Robinson did not fairly present his claim that the "especially cruel, heinous and depraved" aggravating circumstance was arbitrarily found by the sentencing court and upheld by the Arizona Supreme Court, and that Robinson received ineffective assistance of counsel at sentencing. The petitioner argues that the court of appeals erred when it reached these conclusions, and, therefore, a Writ of Certiorari should be issued by this Court. For the reasons set forth below, Robinson respectfully submits that this case is not one that this Court should issue a Writ of Certiorari and moves this Court to deny the Petition.

The court of appeals opinion is reported at *Robinson v. Schriro*, 595 F.3d. 1086 (2010).

Robinson respectfully directs this Court to and adopt herein, the detailed recitation of the procedural history and of findings of fact set forth in the court of appeals opinion.

Robinson notes that his federal habeas corpus petition was filed prior to the enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and accordingly, the provisions of that act do not apply to him. *See, Lindh v. Murphy*, 521 U.S. 320, 336-337 (1997).

The petitioner argues that the court of appeals erred when it held that the

"especially cruel, heinous and depraved" aggravating circumstance was fairly presented to the state courts, and was arbitrarily applied to him. Because Robinson set forth the factual and legal bases of his claim in the state court that he argued to the district court, and that the "especially cruel, heinous and depraved" aggravating circumstance was arbitrarily applied to him, the Court should deny the petition. Furthermore, the Court should deny the petition because the court of appeals was correct when it found that Robinson received ineffective assistance of counsel at sentencing.

The petitioner also argues that Robinson was not prejudiced by his sentencing counsel's failure to investigate and present readily available mitigating evidence. Because counsel's performance was deficient, the only issue remaining is whether Robinson was prejudiced by his counsel's failure to investigate and present mitigation. Robinson was prejudiced, because the mitigating evidence, coupled with the sentencing court's reliance on an improperly found aggravating circumstance, created a reasonable probability that Robinson may not have been sentenced to death.

The facts of the case found by the court of appeals are as follows. On June 8. 1987, Robinson loaded guns into Robinson's car and drove to Yuma Arizona with two other men in search of Robinson's common law wife, Susan Hill, or to rip off a dope dealer. The trio arrived at Ms. Hill's parent's, Ralph and Sterleen Hill, house late the evening of June 8, 1987. Two men gained entry into the house through a ruse. The two men then tied up the Hill's, demanded money, and then shot both of

the Hill's. Mrs. Hill died, Mr. Hill survived. Robinson, who was not identified by Mr. Hill, who knew Robinson, nor LeSean Hill, who was in the house for a short time before running to a neighbor to call the police, was apprehended a short distance from the house. The state presented no evidence that Robinson was inside the house at the time of the killing. *Robinson v. Schriro*, 595 F. 3d 1086, 1091-1092. (2010).

Robinson was charged with first degree murder, and a number of other felonies. The state sought the death penalty. Robinson and his two cohorts were convicted of first degree murder and all other charged felonies. The State sought the death penalty against all three. Following an aggravation hearing, the sentencing judge found that the State proved the following aggravating circumstances. First, Robinson committed the murder in expectation of the receipt of something of pecuniary value. Second, the sentencing court found that the murder was committed in an "especially cruel, heinous or depraved" manner. Third, Robinson committed the murder for the purpose of the receipt of something of monetary value *Robinson v. Schriro*, 595 F. 3d 1086, 1092-1093 (2010). Robinson's counsel presented no mitigation to the court, and Robinson was sentenced to death. *Id.*

On automatic appeal to the Arizona Supreme Court, that court upheld the conviction of Robinson. *State v Robinson*, 165 Ariz. 51, 796 P. 2d 853 (1990). The court upheld two of the aggravating circumstances, but vacated the finding that Robinson committed the murder in expectation of something of pecuniary value. *Robinson v. Schriro*, 595 F. 3d 1086, 1095 (2010). Because Robinson's trial counsel

offered no mitigation at sentencing, the Arizona Supreme Court upheld the death sentence as to Robinson. *Robinson v. Schriro*, 595 F. 3d 1086, 1095 (2010).

Robinson then filed a Petition for Post Conviction Relief in the same sentencing court. Among other claims, Robinson alleged that he was denied the effective assistance of counsel at sentencing. His post conviction counsel presented numerous mitigating circumstances, including that Robinson suffered from Borderline Personality Disorder and Adjustment Disorder with Anxious Mood, that he had been sexually abused as a child, and threatened with death if he reported the abuse. Robinson's also presented evidence that Robinson had been verbally and physically abused by his stepmother, that he grew up in a poor rural town in Texas, and that he was treated with disfavor by his father and stepmother. Counsel introduced evidence that Robinson's IQ was 81. Robinson had a large family, was diabetic, went to church regularly while incarcerated, got along well with his fellow inmates. Robinson was treated with disfavor by his father and stepmother. Robinson was forced to eat leftovers after his step siblings had completed their meals. Robinson had saved his money as a teenager and purchased a car, but his stepmother and father ordered him to give the car to a stepbrother who was going to college. Robinson was a model prisoner and had the potential for rehabilitation. Robinson's mental health expert opined that Robinson did not have hostility toward people, nor that he had a pre-disposition toward violence, and that there was no risk of recidivism. *Robinson v. Schriro*, 595 F.3d 1086, 1095-1098.(1990). After hearing all of the evidence in mitigation, the sentencing court denied the petition

for post conviction relief, stating that the new mitigation evidence would not change his mind about the death sentence imposed. *Robinson*, 595 F.3d. at 1098.

Robinson next filed a petition for a Writ of Habeas Corpus in the Arizona district court in Phoenix. Among other claims he raised were that he received ineffective assistance of counsel at sentencing. He also alleged that the "especially cruel heinous and depraved" aggravating circumstance was arbitrarily applied to him in violation of the Eighth and Fourteenth Amendments, and that he had fairly presented this claim to the Arizona courts.

The district court dismissed the petition, finding that Robinson's sentencing counsel was not ineffective because Robinson could not demonstrate prejudice. The district court found that the sentencing judge had stated that the mitigating evidence would not have changed the result, and that he still would have sentenced Robinson to death. The district court found that the mitigating evidence could not be tied to the murder, using a causal nexus test invalidated by this Court in *Smith v. Texas*, 543, U.S. 37, 45 (2004). *Robinson*, 595 F.3d at 1112. Specifically, the district court found that there was no evidence that Robinson's ability to conform his conduct to the law or to know the difference between right and wrong were not significantly impaired, that Robinson did not establish a causal connection between his impoverished childhood, sexual abuse and unfair treatment and the murder, and that there was no connection between his substandard education, low intelligence, diabetes and physical disability to the crime. *Id.* at 1112.

The district court found that Robinson's claim regarding the "especially cruel,

heinous or depraved" aggravator presented in federal court was substantially different from that raised to the Arizona Supreme Court, and therefore procedurally barred. It also found that sufficient evidence existed to support the finding that the murder was committed in an"especially cruel, heinous or depraved" manner. The district court ruled that sufficient evidence supported the state courts' findings that the murder was senseless and the victim helpless, and that the depravity prong of the aggravating circumstance was properly found. The district court observed that even if the depravity finding was unconstitutional, the error was harmless because the state courts' finding was sufficiently supported by the evidence to apply the aggravating circumstance to Robinson. *Robinson v. Schriro*, 595 F.3d at 1100.

Robinson appealed to the Ninth Circuit. The court of appeals found that the state court's finding that the "especially cruel, heinous or depraved" aggravating circumstance was arbitrarily found and that Robinson fairly presented this claim to the Arizona Supreme Court. The court of appeals found that Robinson presented the substance of the claim he made in his petition for Writ of Habeas Corpus to the Arizona Supreme Court, by presenting both the factual and legal bases of the claim to the Arizona court. Robinson argued specific provisions of the federal constitution cited to federal case law and presented a statement of facts that entitled him to relief. *Robinson v. Schriro*, 595 F.3d 1086, 1101 (2010).

Robinson's argued in the state court that the imposition of the death penalty violated the Constitution, because the "especially cruel heinous or depraved"

aggravating circumstance was applied in an arbitrary manner. Robinson cited *Jeffers v. Ricketts*, 832 F.2d 476 (9th Cir. 1987) *rev'd sub nom, Lewis v. Jeffers*, 497 U.S. 764 (1990), in support of his argument. In *Jeffers*, the Court held that the "especially cruel heinous or depraved" aggravator was applied arbitrarily to Jeffers, in violation of the Eighth Amendment, because there was no principled way to distinguish Jeffers' conduct from that in other cases where the Arizona courts had found that the behavior at issue was not especially heinous or depraved. *Jeffers v. Ricketts*, 832 F.2d at 483-485.

REASONS FOR DENYING THE PETITION

The petitioner does not present compelling reasons for this Court to grant certiorari. The petitioner's questions are not of national importance, do not cite to a circuit conflict, and do not demonstrate that the opinion below is in conflict with this Court's precedent. *See* Sup. Ct. Rule 10. The petitioner is merely requesting that this Court overturn the court of appeals opinion because it is dissatisfied with the result reached by the court of appeals.

I.

ROBINSON'S CLAIM THAT THE "ESPECIALLY CRUEL, HEINOUS AND DEPRAVED" AGGRAVATING CIRCUMSTANCE WAS FAIRLY PRESENTED TO THE ARIZONA SUPREME COURT. FURTHERMORE, THE COURT OF APPEALS WAS CORRECT THAT THE ARIZONA COURT ARBITRARILY FOUND THIS AGGRAVATING CIRCUMSTANCE APPLIED TO ROBINSON, BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE FINDING.

The court of appeals found that the state court's finding that the "especially

cruel, heinous or depraved" aggravator was proved by the State was arbitrary, and that Robinson presented the substance of the claim to the state court. The court of appeals found that Robinson presented the substance of the claim to the state court because he presented both the factual and legal bases of the claim to the court. Robinson was required to reference specific provisions of the federal constitution or cite to federal case law and to present a statement of facts that entitled him to relief, and present the legal basis for the claim to the state court. *Robinson v. Schriro*, 595 F.3d at 1101.

Robinson argued that the imposition of the death penalty was in violation of the United States constitution, because the "especially cruel, heinous or depraved" aggravating circumstance was arbitrarily found. Robinson cited, *Jeffers v. Ricketts*, 832 F.2d 476 (9th Cir.1987), *rev'd. sub. nom., Lewis v. Jeffers* 497 U.S. 764 (1990). In *Jeffers* the court held that the "especially cruel, heinous or depraved" aggravating circumstance was arbitrarily found, because there was no principled way to distinguish *Jeffers'* conduct from the other cases where the aggravator was applied. *Jeffers v. Ricketts, supra.*

The court of appeals found that the district court erred by concluding that, Robinson did not fairly present a claim based on lack of intent or foreseeabilty. The court of appeals found that Robinson argued to the state court that the finding of the aggravator was unconstitutional. Robinson also argued that the imposition of the death penalty in his case was arbitrary and capricious. The court of appeals found that Robinson had fairly presented the factual bases for the claim, when

Robinson argued that he had no part in the murder, nor did he order the killing, or instruct how it was to occur. The court of appeals concluded that these arguments clearly exhausted the federal claim. *Robinson v. Schriro*, 595 F.3d at 1101.

The court of appeals found that Robinson was not required to present the argument in the same amount of detail in both courts. He was only required to present the factual and legal bases of the claim to the state court, which he did. He cited to a federal case that held that the application of the "especially cruel, heinous and depraved" aggravator to a murderer violated the Eighth and Fourteenth Amendments of the United States Constitution. He therefore presented the same claim to the State court, that given his lack of participation in the murder, the finding of the "especially cruel heinous and depraved" aggravator violated the constitution. *Robinson v. Schriro*, 595 F.3d at 1102.

II.

ROBINSON FAIRLY PRESENTED HIS CLAIM TO THE STATE COURT THAT THE "ESPECIALLY CRUEL, HEINOUS OR DEPRAVED" AGGRAVATOR WAS ARBITRARILY FOUND BY THE SENTENCING COURT.

In *Picard v. Conor*, 404 U.S. 270 (1971) this Court stated that a constitutional violation must be fairly presented in state court. However, he need not cite "book and verse" of the constitution to do so. *Id.* at 278. Robinson fairly presented his claim to the Arizona Supreme Court by arguing that the "especially cruel, heinous or depraved" aggravator was arbitrarily found by the state court, because Robinson did not participate in the killing, did not order the killing, or that it be committed in

an "especially cruel, heinous or depraved" manner. This claim were fairly presented to the state court, and were sufficient to preserve the issue for federal review.

This argument is also supported by *Baldwin v. Reese*, 541 U.S. 27, (2004). In *Baldwin*, this Court stated that a litigant wishing to raise a federal claim in state court can easily indicate the federal law bases for the claim in state court by citing, in conjunction with the claim, the federal source of law upon which he relies or a case deciding such a claim or by simply labeling the claim "federal." *Baldwin v. Reese*, 541 U.S. at 32.

Robinson made clear to the state court that he was invoking a federal right. Robinson alleged a narrow and specific constitutional right, the right to be free from the arbitrary application of an aggravator leading to the arbitrary imposition of the death penalty and cited a federal case, *Jeffers*, that held that the right was violated because the aggravator was arbitrarily applied to Jeffers. Robinson also alleged the factual bases for that claim, specifically, his lack of participation in the murder. This combination was sufficient to present his claim to the state court.

A claim may be elaborated on in the habeas petition. *Picard v. Connor*, 404 U.S. 270, 277. Variations in the legal theory or factual allegations are also allowed. *Id.* Robinson was not required to advance his arguments in state court in the same detail as he did in federal court. Even if Robinson only argued that the victim suffered no pain and therefore the murder was not especially cruel, he would have preserved his claim for federal review. A finding of cruelty means that the *killer* inflicted pain or suffering on the victim prior to killing her. *State v. Carlson*, 201

Arizona 570, 48 P.3d 1180 (2002). (Emphasis supplied.) It follows that Robinson argued that he did not inflict pain because he was not in the house and did not kill the victim, Mrs. Hill. Necessarily included in his argument was the sub argument that, because he did not participate in the murder, or order how it would be accomplished, the aggravator found against him was arbitrary. This would be sufficient to preserve his cruelty claim for federal review. Robinson made clear that he was invoking a federal right, the right to be free from the arbitrary application of an aggravator and cited to *Jeffers,* which held that the aggravator was arbitrarily applied to *Jeffers.* Robinson also alleged the factual bases for the claim, his lack of participation in the murder, or ordering the manner in which it was to be committed. This combination was sufficient to present federal claim to the state court. The state court rejected this claim on the merits, *State v. Robinson*, 796 P.2d at 858, so the federal court is not barred from reviewing it.

Conducting plenary review of the State's fair presentation claim would amount to nothing more than error correction and in any event would not materially alter the court of appeals decision to grant relief. The petitioner is simply asking this Court to do what the court of appeals did: review Robinson's appellate brief and decide whether that brief alerted the Arizona Supreme Court to the factual and legal bases of his claims against one of the aggravating factors on which his death sentence rests. This is just error correction, which this Court does not do. *See, Ross v. Moffit*, 417 U.S. 600, 616-617 (1974) ("This Court's review...is discretionary and depends on numerous factors other than the perceived

correctness of the judgment we are asked to review."). In any event, the court of appeals correctly found that Mr. Robinson fairly presented his claim to the Arizona Supreme Court.

The court of appeals correctly concluded that Robinson fairly presented his claim to the state court. It followed Supreme Court precedent in doing so. It's decision is not one of national importance, nor does it create a split in the circuits. The decision was based on sound analysis, and broke no new ground. It is not a claim that this Court should grant certiorari on, since it decided a mere run of the mill exhaustion issue. Therefore, the Court should deny certiorari on this claim.

III.

THE COURT OF APPEALS CORRECTLY FOUND THAT THE SENTENCING COURT ARBITRARILY FOUND THAT THE "ESPECIALLY CRUEL, HEINOUS OR DEPRAVED" AGGRAVATOR WAS ARBITRARILY FOUND BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE FINDING.

The court of appeals correctly decided this claim. Robinson argued that there was insufficient evidence that he committed the murder in an "especially cruel, heinous or depraved" manner. To grant relief on a habeas corpus claim, the Court must find not only that the state and district court's finding was erroneous, but that it was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation. *Lewis v. Jeffers*, 497 U.S. at 780. The standard of review on this claim is the rational fact finder standard. *Id.* at 781. This means that a state court's finding of an aggravator is arbitrary and capricious if and only if no reasonable sentencer could have so concluded. *Id.* at 783. Because the

aggravator is listed in the disjunctive, the reviewing court must find each prong was arbitrarily found. In Arizona, cruelty focuses on the suffering of the victim, while heinousness and depravity focus on the state of mind of the killer. *State v. Carlson*, 202 Ariz. 570, 48 P.3d 1180, 1191 (2002). The court of appeals found that the application of all three prongs was arbitrary because there was no evidence that Robinson participated in the murder, intended the murder, or reasonably foresaw the murder, *or the manner in which it was carried out. Robinson v. Schriro*, 595 F.3d 1086, 1104 (Emphasis supplied). Even the petitioner admits that the only evidence connecting Robinson to the murder was that he loaded the guns into his vehicle, and was apprehended a short distance away from the Hill's house. Petition, P. 3. Therefore, the petitioner acknowledges that Robinson did not murder Mrs. Hill, or order that she be killed, or specify the manner of the murder. Thus, the petitioner acknowledges that there was no evidence presented that would demonstrate that Robinson committed the murder in an "especially cruel, heinous or depraved" manner, or that he reasonably foresaw that such a murder, in such a manner, would occur. The petitioner did not cite any evidence of Robinson's state of mind. The most that can be said of the evidence relating to Robinson's participation was that he formulated a plan to have his co-defendants invade the Hill's home. The state court's lack of findings on these key points made the finding of the aggravating circumstance arbitrary.

In Arizona, there is no vicarious liability for cruelty in death cases absent a plan to cause suffering. The plan must be such that suffering before death must be

inherently and reasonably certain to occur. *State v. Carlson*, 48 P.3d at 1193. Allowing mere foreseeabilty to support a finding of the aggravator would not allow the aggravator to narrow the class of first degree murderers who can be sentenced to death. *Id.* at 1192. The state court made no finding that Robinson participated in the murder, to support a finding of cruelty. That court was required to address whether Robinson in any way intended or anticipated the manner of Mrs. Hill's murder. The Arizona Supreme Court did not address foreseeabilty. This failure to apply a constitutionally necessary narrowing principle of state law in applying an aggravator circumstance was arbitrary, and violated Robinson's rights under the Eighth Amendment.

The court of appeals also found that Robinson's lack of personal participation in the murder rendered the application of the heinous and depraved prongs of the aggravator arbitrary. In Arizona, a finding of heinousness or depravity focuses on the state of mind of the killer. *State v. Newell*, 212 Ariz. 389, 132 P.3d 833 (2006). The words or actions of the killer control this determination. *State v. Murdaugh*, 209 Ariz. 19, 97 P.3d 844, 856 (2004). The state court relies on five factors to establish a heinous or depraved state of mind. These factors are, (1) relishing the killing,(2) commission of gratuitous violence, (3) mutilation of the victim, (4) senselessness of the killing and (5) helplessness of the victim. *State v. Detrich*, 188 Ariz. 57, 932 P.2d 1328 (1997).

The state court found that Robinson had a depraved state of mind based on the fact that the killing was senseless and the victim was helpless. *State v.*

Robinson, 796 P.2d at 863. The state court found that tying up two people, forcing them to lie on the floor, and then senselessly shooting them amounted to depraved conduct. *Id.* In Arizona, senselessness and helplessness will ordinarily not be sufficient to prove depravity. *State v. Ross*, 180 Ariz. 598, 886 P.2d 1354 (1994). The court of appeals found that its conclusion that this prong was arbitrarily found because Robinson did not participate in the murder, order it, or instruct the killers to carry it out in a particular manner. *Robinson v. Schriro*, 595 F.3d 1106. Thus, Robinson's state of mind at the time of the murder is unknown. *Id.* at 1107. Because heinousness and depravity focus exclusively on the state of mind of the killer, the lack of evidence of Robinson's state of mind rendered the state court's findings on these two prongs of arbitrary. *Id.* at 1108.

In deciding this issue, the court of appeals engaged in an intensive fact based analysis of the murder, looked to Arizona case law for guidance, and relied on settled Supreme Court precedent to reach its conclusion. The court of appeals broke no new ground, and did not make new law. Therefore, the Petition for Certiorari should be denied on this claim.

In any event, correcting the court of appeals' procedural assessment of Claim 6-A would not affect its disposition on the merits of Claim 6-B and therefore Mr. Robinson would still be entitled to relief from his death sentence.

Even if this Court were to correct the court's procedural assessment of Claim 6-A, Robinson is still entitled to relief. The State has not asked this Court to review the court of appeal's treatment of Claim 6-B, which the district court denied

on the merits but the court of appeals granted on the merits. Because both Claims 6-A and 6-B constitute independent bases on which to strike the same aggravating factor in Robinson's case, the court of appeal's grant of habeas relief from the death sentence will stand even if this Court should hold that Claim 6-A was not fairly presented to the Arizona Supreme Court on direct appeal.

1. As the court of appeals explained before the district court, Robinson challenged the finding that the murder was committed in an "especially cruel, heinous or depraved" manner, *see*, Ariz. Rev. Stat. § 13-703(F)(6), on two grounds. The first, which the district court classified as Claim 6-A, challenged the sufficiency of the (F)(6) finding because the evidence was not sufficient to conclude that Mr. Robinson "intended or reasonably foresaw" that the victim would suffer. *Robinson v. Schriro*, 595 F.3d at 1100. The second, which the district court classified as Claim 6-B, challenged the sufficiency of the (F)(6) finding on the basis of Robinson's "involvement in the crime." *Id.* The court of appeals concluded that "Robinson's lack of personal participation in the murder renders the sentencing court's application of the heinous or depraved factor arbitrary" because of the sentencing court's "total failure... to address the lack of evidence that Robinson was present for or ordered the killing." *Id.* at 1106.

Just as a defendant who is not present at the scene and does not order the killing cannot commit the murder in an especially heinous or depraved manner, such a defendant also cannot commit the murder in an especially cruel manner. *See, State v. Carlson*, 46 P.3d 1180, 1193-95 (Ariz. 2002) (vacating the "especially

heinous, cruel, or depraved" aggravating factor because the defendant was neither present during the commission of the murder nor involved in the planning of the murder or the procurement of the murder weapon). In this case, if the heinousness and depravity findings cannot stand because Mr. Robinson neither was present for the killing nor did he order it, then neither can the cruelty finding. Thus the court of appeal's grant of relief on Claim 6-B necessarily requires that the sentencing-phase relief that the court of appeals granted in this case must stand.

2. The fact that the State has not asked this Court to review the court of appeal's treatment of Claim 6-B confirms that the sentencing-phase relief must stand. Further review of the disposition of Claim 6-B is waived because the petitioner has failed to ask this Court to do so. Furthermore, the question of whether the court of appeals correctly resolved the merits of Claim 6-B is not fairly included within the question that the State *has* presented for review—whether Robinson fairly presented Claim 6-A to the Arizona Supreme Court for purposes of the exhaustion doctrine. Accordingly, the State has waived any challenge to Claim 6-B before this Court, *see, Wood v. Allen*, 130 S.Ct. 841, 851 (2010) (citing *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31 n.5 (1993) (per curiam), and this Court should therefore allow the court of appeal's grant of sentencing-phase relief to stand on this ground.

Assuming that this Court were to conclude that Claim 6-A was not fairly presented to the Arizona Supreme Court, it would remain for the court of appeals on remand to decide (a) whether Robinson had shown cause and prejudice to lift the

procedural default on that claim, (b) whether to conduct any harmless error review, and (c) what form of relief would remain for it to order in view of its identification of constitutional error relating to Claim 6·B.

IV.

ROBINSON RECEIVED INEFFECTIVE ASSISTANCE BECAUSE HIS COUNSEL CONDUCTED NO INVESTIGATION INTO READILY AVAILABLE MITIGATION, AND PRESENTED NO MITIGATION TO THE SENTENCING COURT, AND ROBINSON WAS PREJUDICED BY HIS FAILURE TO DO SO.

A. The court of appeals correctly concluded that Robinson received ineffective assistance of counsel at the penalty phase of his trial.

1. The court of appeals correctly concluded, and the petitioner does not now contest, that sentencing counsel rendered constitutionally deficient performance. The petitioner cannot make this argument, because the court of appeals found that Robinson's attorney met with him only briefly prior to sentencing, and asked him a few questions about mitigating witnesses. Sentencing counsel did not contact any member of Robinson's family and did not obtain employment, medical, school, or mental health records. He did not hire an investigator or mitigation specialist, nor did he hire a mental health expert, He did not call prison guards who would have testified that Robinson was a model prisoner and conducted no investigation into mitigation whatsoever. *Robinson v. Schriro*, 595 F.3d 1086, 1109·1110. The court of appeals found that Robinson's attorney had no strategic reason for failing to investigate or present mitigation, and that presenting mitigation would not open the door to damaging aggravating evidence.

Id. at 1110. His presentation of mitigation was that Robinson did not have a history of violence, and that he was, "apparently", a good father. *Robinson v. Schriro,* 595 F.3d at 1109.

The court of appeals found that had Robinson's sentencing attorney conducted such an investigation, he would have discovered "classic mitigation." *Id.* at 1110. This mitigation included Robinson's impoverished background, his unstable and abusive upbringing, his childhood sexual abuse, and that he was threatened with death if he reported the abuse, his low intelligence, his borderline personality disorder, his non violent nature, and his potential for rehabilitation. Other mitigation was that Robinson maintained a relationship with his family, attended church regularly and was classified at the lowest security level for a death row inmate. A psychological evaluation revealed that Robinson was not violent, posed a low risk of future dangerousness, and had a helpful and easy going personality. *Id.* at 1110-1111.

This Court has found counsel deficient where he does not investigate mitigation, *(Terry)Williams v. Taylor,* 529 U.S. 362 (2000), *Wiggins v Smith,* 539 U.S. 570 (2003). Counsel was clearly deficient, and the petitioner concedes as much.

2. The court of appeals correctly concluded that Robinson suffered prejudice from counsel's constitutionally deficient performance.

The petitioner argues that Robinson did not demonstrate prejudice. Pet. P. 18. He states that the court of appeals decision that the state and district court

"underweighted" Robinson's additional mitigation ignored this Court's ruling in *Harris v. Alabama*, 513 U.S. 504 (1995), and held that the state court must give particular weight to proffered mitigation. The petitioner did not cite *Harris* in his brief to the Ninth Circuit. Therefore, he has waived those arguments. *Baldwin v. Reese*, 541 U.S. 27, 34 (2004). In any event, the court of appeals, relying on *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny, *see, (Terry) Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Porter v. McCollum*, 130 S.Ct. 447 (2009) (*per curiam*), correctly concluded that Robinson was prejudiced by counsel's failure to uncover and present "classic mitigation evidence." The court of appeals carefully weighed the additional mitigation against the remaining aggravating circumstance and stated that the state court's failure to reweigh the mitigation against the aggravating circumstance undermined confidence in Robinson's sentencing proceeding. *Robinson v. Schriro*, 595 F.3d 1086, 1113.

The petitioner argues that the same judge who sentenced Robinson to death heard the additional mitigation, and found it to have little weight. Pet. P.17. The petitioner acknowledges that "The state court found that Robinson's additional mitigation evidence, particularly evidence of Robinson's childhood, *had no connection to his actions years later at the time of the murder*, and thus were not mitigating." Pet P. 7. (Emphasis supplied). The petitioner acknowledges that the state court utilized an unconstitutional nexus test to weigh and consider the mitigation held to be unconstitutional in *Smith v. Texas*, 543 U.S. 37. (2004). This

was improper, and infected the case with constitutional error. *Robinson v. Schriro*, 595 F.3d 1086, 1112. The court of appeals found that the district court utilized the same unconstitutional nexus test in ruling against Robinson. *Id.* at 1112.

The petitioner's effort to characterize the state court's causal nexus requirements as affecting only the weight of the mitigation evidence runs contrary to *Tennard v. Dretke*, 542 U.S. 274 (2004) and *Smith v. Texas*, 543 U.S. 37 (2004). *Harris v. Alabama*, 513 U.S. 504 (1995) is inapposite. The state court substituted its own judgment for that of a reasonable sentencer and improperly limited its consideration of such evidence to that causally connected to the crime. The district court made the same error.

The second error of the state court was that it relied on the invalid aggravator. Removing this aggravator circumstance from the reweighing exercise would have changed the sentencing calculus. Instead of weighing two aggravating circumstances, the state court would only have weighed one against the extensive mitigation. *Robinson*, 595 F.3d. at 1112. Coupled with the additional mitigation, including Robinson's "horrific childhood" Pet. P. 17., there existed a reasonable probability that Robinson would not have received death. *Strickland v. Washington*, 466 U.S. 668 (1984). This Court has stated that when a sentencing court uses an invalid aggravating circumstance to impose death, a new sentencing must occur, unless the state court reweighs or conducts a harmless error analysis. *Clemons v. Mississippi*, 494 U.S. 738 (1990). The state court did neither, thereby warranting a new sentencing. This is because no court can be sure of the outcome

of a death sentencing proceeding when the court's thumb was initially placed on death's side of the scale. This error undermined the court of appeal's confidence in the imposition of the death sentence because, had the state court properly evaluated the mitigation and weighed it against the lone aggravator, there was a reasonable probability that Robinson would have received life. *Robinson v. Schriro*, 595 F.3d. at 1113.

The petitioner argues, at Pet. P. 18, that the court of appeals confused the discussion of weighing with the Supreme Court's proscription against precluding the sentencer from considering and giving effect to certain mitigation. According to the petitioner, the court of appeals decision ignores this Court's precedent cited in his petition and "creates a new requirement for sentencer's in capital cases." Pet. P. 18. The petitioner argues that "This Court, however, has never required the sentencer to place particular weight to mitigation evidence." Pet. P. 17. This assertion is not quite correct. In *(Terry) Williams v. Taylor*, 529 U.S. 362, 397-398, this Court stated that the state court failed to evaluate the totality of mitigation. "It thus failed to accord *appropriate* weight to the body of mitigation available to trial counsel." Therefore, this Court has instructed state courts how it must weigh mitigation in a capital case, by giving the mitigation evidence "appropriate" weight. Therefore, the petitioner's claim that this Court has never directed a state court on how much weight to give mitigation cannot stand given *Williams*. Thus, the petitioner's second argument for granting the Petition, that the court of appeals decision "created a new requirement in capital cases where the sentencer must give

weight to proffered mitigation evidence" Pet. P.16., lacks merit and must fail, because the court of appeals found that the state court did not give appropriate weight to the mitigation. The court of appeals imposed no new requirement, but only followed *Williams* in finding that the state court, did not give appropriate weight to the mitigation. Therefore, there are no grounds for granting the Petition on this claim.

3. The petitioner's reliance on several recent decisions of this Court on the claims of ineffective assistance of counsel are misplaced because in these recent cases, counsel conducted a thorough investigation into mitigation and presented substantial mitigation to the sentencer.

The petitioner relies on several recent decisions of this Court as justification for granting its Petition. The first is *Wong v. Belmontes*, 558 U.S. ___, 130 S. Ct. 383 (2009). In that case, this Court reversed the Ninth Circuit's finding that Belmontes suffered prejudice when his sentencing lawyer did not offer additional mitigation on behalf of Belmontes. *Id.* at 384. Belmontes had committed a previous murder, for which he was not prosecuted. The State sought to introduce this evidence in rebuttal. This Court found that the evidence was "potentially devastating." The state court had precluded this evidence in the state's case in chief, but would allow it if Belmontes' argued he was non violent. *Id.* at 385. Belmontes called nine witnesses, without opening the door. *Id.* at 386. His mitigation was "substantial" and consisted of witnesses who testified that Belmontes had a terrible childhood, his father was an abusive alcoholic, and that he

grew up in a hovel. Other mitigation was that he a high school dropout. His infant sister and grandmother died when Belmontes was young. Belmontes maintained strong family ties. Belmontes experienced a religious conversion and counseled other inmates. His chaplain testified that he would use Belmontes as a counselor. Belmontes also worked as a prison firefighter while incarcerated. *Belmontes*, 130 S.Ct. at 387. Belmontes' counsel conducted an investigation into mitigation and presented substantial mitigation to the sentencer.

This Court found that, to prove prejudice, that the mitigation presented, plus the additional mitigation that his lawyer did not present, coupled with the additional aggravation relating to the prior murder, would have probably resulted in a life sentence. *Belmontes,* 130 S.Ct. at 386. This Court found that it would not.

This Court found that some of the mitigating evidence was cumulative to that already presented. Other evidence would have opened the door to evidence of the prior murder, which would have damaged him. This Court found that the additional mitigation would not have carried the day, and was cumulative. *Belmontes*, 130 S.Ct. at 387.

Unlike Belmontes, Robinson's attorney presented no mitigation evidence because he did not investigate mitigation. The undiscovered mitigation evidence was substantial. The sentencing judge committed two constitutional errors in concluding that the additional mitigation would not have changed the result, the use of the unconstitutional nexus test and the reliance on an invalid aggravating circumstance. There was no danger that introducing the mitigation at sentencing

would have opened the door to additional aggravating evidence. Thus, Robinson's case is in stark contrast to Belmontes', because Robinson's counsel did not conduct an investigation and presented no mitigation.

The petitioner next relies on *Bobby v. Van Hook*, 558 U.S. ___ 130 S.Ct. 13 (2009). In *Bobby*, counsel conducted an investigation. They contacted family members and friends on a regular basis. They contacted two expert witnesses. They considered using a mitigation specialist. They contacted a representative from the Veteran's Affairs Department and attempted to obtain his medical records. *Bobby*, 130 S.Ct. at 18.

Counsel also presented substantial mitigating evidence. They presented evidence that Van Hook's parents were heavy drinkers, and that his father introduced Van Hook to drinking at an early age. Van Hook began abusing substances at an early age. His father regularly beat his mother. Van Hook saw his father hold his mother at gun and knife point, and subjected her to sexual violence. Van Hook attempted suicide five times. Van Hook suffered from Borderline Personality Disorder. His use of drugs on the day of the crime, impaired his ability to refrain from committing the crime, and that his senseless and bizarre brutality may have resulted from homosexual panic. *Bobby*, 130 S.Ct. at 18-19.

This Court found that Van Hook was not prejudiced by counsel's failure to offer additional mitigation, which was "of no value" and that no prejudice was demonstrated. *Bobby*, 130 S.Ct. at 19-20.

Again, *Bobby* is materially different than *Robinson*. In *Bobby*, the lawyers

investigated and presented powerful mitigating evidence. In *Robinson*, counsel conducted no investigation and presented no mitigation. Robinson's mitigation was powerful and readily available. The aggravation in *Robinson* was not as strong as in *Bobby*, further undermining confidence in the outcome of the case. Clearly, Robinson's case is light years removed from Van Hook's, because Van Hook's lawyers investigated and presented powerful mitigating evidence, while Robinson's counsel did neither. Van Hook's aggravation was stronger than that in *Robinson*. Therefore, this Court should not grant the Petition based on *Bobby* simply because *Bobby's* facts are materially different from those in *Robinson*.

The petitioner also cites to *Porter v. McCollum*, 505 U.S. ___ , 130 S. Ct. 447 (2009) and argues that the court of appeals reliance on *Porter* was flawed. The court of appeals found that Porter's case was similar to Robinson's with respect to the mitigation evidence. The petitioner argues that Porter's additional mitigation was more compelling than Robinson's, and does not support Robinson's IAC claim.

In *Porter*, sentencing counsel did not investigate nor present evidence of Porter's horrific combat experiences. He also did not investigate nor present Porter's abusive childhood, his heroic military service and the trauma he suffered because of it, his long term substance abuse, and his impaired mental health and mental capacity. *Porter*, 130 S.Ct. at 449.

Porter endured a very abusive childhood. He joined the Army at 17. He experienced combat of almost indescribable brutality. *Porter*, 130 S.Ct. at 450. Contrary to the petitioner's argument that Robinson's mitigation paled in

comparison to *Porter*, with the exception of Porter's battle experiences, Robinson presented remarkably similar mitigation. He presented evidence of his horrific childhood, evidence that he was sexually abused, and evidence that he was mentally impaired. Just because Robinson did not experience gruesome combat experience does not discount Robinson's mitigation. In *Porter*, this Court did not create a new gold standard for mitigation, by citing to Porter's war time experience. *Porter* did not overrule *Strickland, Williams* or *Wiggins'* command that counsel investigate and present all available mitigation to the sentencer. The reviewing court must reweigh all of the available mitigation that could have been presented against the aggravation. This is what the court of appeals did, and the recent cases cited by the petitioner cannot form the basis for granting his petition in this case.

CONCLUSION

Counsel respectfully requests that the Court deny the petition as it does not meet the Court's criteria for granting a petition for certiorari.

Respectfully submitted this 4th day of October, 2010.

Patrick E. McGillicuddy
331 N. First Avenue, Suite 210
Phoenix, Arizona, 85003
Phone:(602)452-2915
Fax: (602)926-8422
* Counsel of Record

COUNSEL FOR RESPONDENT

Lauriane R. Litzau

Metro Paralegal Services
331 N. First Ave., Suite 106
Phoenix, Arizona 85003
602-550-5342
Litz2@aol.com

October 4, 2010

UNITED STATES SUPREME COURT
OFFICE OF THE CLERK
1 FIRST STREET, N.E.
WASHINGTON, D.C. 20543

RE: BRIEF IN OPPOSITION
10-034

Dear Clerk of the Court:

I would be greatly appreciated if you could conform the enclosed documents and return them in the self-addressed, stamped envelope to:

Mr. Patrick E. McGillicuddy, Esq.
331 N. First Avenue, Suite 210
Phoenix, Arizona 85003

Thank you.

Sincerely,

Lauriane R. Litzau
Paralegal to Mr. McGillicuddy, Esq.

lrl
Enclosures as Indicated